

Doctrine of Discovery

Purpose: Tracing the history of U.S. rail transport regulations and federal grant of railroad rights of way over Indian lands back to the U.S. Supreme Court decision of *Johnson v. M'Intosh* (1823), which sanctions a policy domination and dehumanization rooted in the "Doctrine of Discovery"

CITATION HISTORY

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| Part I: | Legislative history of federal rail transport regulatory authority. |
| | <i>Interstate Commerce Commission Termination Act</i> , 109 Stat. 803 (1995) |
| | <i>Staggers Rail Act of 1980</i> , 94 Stat. 1895 (1980) |
| | <i>Railroad Revitalization and Regulatory Reform Act</i> , 90 Stat. 31 (1976) |
| | <i>Esch-Cummins Act</i> , 41 Stat. 456 (1920) |
| | <i>Formation of the United States Railroad Administration</i> , |
| | <i>Presidential Proclamation 1419</i> (December 26, 1917) |
| | <i>Valuation Act</i> , 37 Stat. 701 (1913) |
| | <i>Mann-Elkins Act</i> , 36 Stat. 539 (1910) |
| | <i>Hepburn Act</i> , 34 Stat. 584 (1906) |
| | <i>Elkins Act</i> , 32 Stat. 847 (1903) |

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| | <i>Interstate Commerce Act</i> , 24 Stat. 379 (1887) |
| Part II: | Rail transport regulatory authority is necessary following construction of the transcontinental |
| | railroad, as authorized by the Pacific Railway Acts, which allows the U.S. to break previous |
| | treaties with Native Americans and grants railroad companies rights of way over Indian lands. |
| | <i>Pacific Railway Act</i> , 14 Stat. 66 (1866) |
| | <i>Pacific Railway Act</i> , 13 Stat. 504 (1865) |
| | <i>Pacific Railway Act</i> , 13 Stat. 356 (1864) ¹ |
| | <i>Pacific Railway Act</i> , 12 Stat. 807 (1863) |
| | <i>Pacific Railway Act</i> , 12 Stat. 489 (1862) ² |
| Part III: | In justification of grants of rights of ways to the railroads, the U.S. Supreme Court holds that |
| | Congress, as authorized by the Pacific Railway Acts, and consistent with the plenary power of |
| | legislation in regard to Indian affairs, may extinguish tribal interest in real property, including |
| | Indian lands secured by Treaty. |
| | <i>Buttz v. Northern Pacific Railroad</i> , 119 U.S. 55 (1886) |
| | <i>Beecher v. Wetherby</i> , 95 U.S. 517 (1877) ³ |
| | <i>Johnson v. M'Intosh</i> , 21 U.S. 543 (1823) |

SUMMARIES

Interstate Commerce Commission Termination Act, 109 Stat. 803 (1995)

- Substantially deregulates the railroad industry and replaces the ICC with the Surface Transportation Board (“STB”). The STB has exclusive jurisdiction over “transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . , practices, routes, services, and facilities of such carriers,” as well as the “abandonment, or discontinuance of tracks.” 49 U.S.C. § 10501(b).
- The remedies provided by the ICCTA “with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.*

Staggers Rail Act of 1980, 94 Stat. 1895 (1980)

- Further reduces ICC authority by allowing railroads to set rates more freely and become more competitive with the trucking industry.

Railroad Revitalization and Regulatory Reform Act, 90 Stat. 31 (1976)

- Gives railroads more flexibility in pricing and service arrangements; also transfers some powers from the ICC to the newly formed United States Railway Association, a government corporation, regarding the disposition of bankrupt railroads.

Esch-Cummins Act, 41 Stat. 456 (1920)

- Federal control of America's railways continues through the rest of the war until the Esch-Cummins Act, commonly known as the Transportation Act of 1920.

Formation of the United States Railroad Administration, Presidential Proclamation 1419 (December 26, 1917)

- Nationalization of the U.S. railroad system against a background of wartime emergency.

Valuation Act, 37 Stat. 701 (1913)

- Requires the ICC to organize a Bureau of Valuation that would assess the value of railroad property. This information would be used to set freight shipping rates.

Mann-Elkins Act, 36 Stat. 539 (1910)

- Strengthens ICC authority over railroad rates and expanded its jurisdiction to include regulation of telephone, telegraph, and cable companies.

Hepburn Act, 34 Stat. 584 (1906)

- Authorized the ICC to set maximum railroad rates, and extended the agency's authority to cover bridges, terminals, ferries, sleeping cars, express companies and oil pipelines.

Elkins Act, 32 Stat. 847 (1903)

- Minor amendment to the Interstate Commerce Act authorizing the ICC to impose heavy fines on railroads that offered rebates, and upon the shippers that accepted these rebates.

Interstate Commerce Act, 24 Stat. 379 (1887)

- First major federal law that was designed to regulate the railroad industry. The Act also created the Interstate Commerce Commission ("ICC") to regulate common carriers, becoming the first national industrial regulatory body in the U.S.

Pacific Railway Act, 12 Stat. 489 (1862)

- The Pacific Railway Acts were a series of acts (1862, '63, '64, '65, '66) that promoted the construction of a "transcontinental railroad" in the U.S through the issuance of extensive grants of land throughout the Western U.S. to railroad companies.
 - Railroad companies were granted contiguous rights of way for their rail lines as well as all public lands within 200 feet on either side of the track.
- To increase the amount of public land available to the railway companies, the legislation allowed the U.S. government to break previous treaties with Native Americans concerning landownership in the West.
 - Prior to passage of the 1962 Act, Indian lands were not "public lands,"

nor subjected to the operation of acts dealing with “public lands,” but remanded “Indian lands.”

- *However*, the 1962 Act proclaimed: “The United States shall extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of this act, and required for the said right of way and grants hereinafter made.” at Sec. 2.
- By the time the transcontinental railroad was completed, the railroad companies had been granted more 175 million acres of public land.

Buttz v. Northern Pacific Railroad, 119 U.S. 55 (1886)

- Affirms that the Pacific Railway Act is an act of Congress that preempts an Indian Treaty.
- “In the grant to the Railroad Company now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians.” at 68.
- “The land in controversy ... through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the [Pacific Railway Act] was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the [Railroad] company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this encumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals. As we said in *Beecher v. Wetherby*, the ...” at 66.

Beecher v. Wetherby, 95 U.S. 517 (1877)

- “[T]he right which the Indians held was only of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government. It was so ruled in *Johnson v. M’Intosh* in 1823 that ...” at 525.

Johnson v. M’Intosh, 21 U.S. 543 (1823)

- The U.S. Supreme Court, speaking by Chief Justice Marshall, stated the origin of the doctrine of ultimate title and dominion in the United States – the “Discovery Doctrine”.
- Marshall begins with a lengthy discussion of history of the European discovery of the Americas and the legal foundations of the American Colonies. In

particular, Marshall focuses on the manner in which each European power acquired land from the indigenous occupants. Synthesizing the law of nations, Marshall traces the outlines of the *discovery doctrine* - namely, that a European power gains radical title (also known as sovereignty) to the land it discovers. As a corollary, the discovering power gains the exclusive right to extinguish the *right of occupancy* of the indigenous occupants, which otherwise survived the assumption of sovereignty.

- Marshall's "Discovery Doctrine", as later summarized by the U.S. Supreme Court in *Buttz v. Northern Pacific Railroad*, 119 U.S. 55 (1886):
 - "...that, upon the discovery of America, the nations of Europe were anxious to appropriate as much of the country as possible, and, to avoid contests and conflicting settlements among themselves, they established the principle that discovery gave title to the government by whose subjects or by whose authority it was made, against all other governments. This exclusion of other governments necessarily gave to the discovering nation the sole right of acquiring the soil from the natives, and of establishing settlements upon it.
 - It followed that the relations which should exist between the discoverer and the natives were to be regulated only by themselves. No other nation could interfere between them. The Chief Justice [Marshall] remarked that 'the potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity in exchange for unlimited independence.'
 - Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy." at 67.